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# THE NINETEENTH AMENDMENT.

## *THE AMENDING CLAUSE WAS PROVIDED FOR CHANGING, LIMITING, SHIFTING OR DELEGATING "POWERS OF GOVERNMENT." IT WAS NOT PROVIDED FOR AMENDING "THE PEOPLE." THE 19th AMENDMENT* IS THEREFORE ULTRA VIRES.

ARTICLE V was provided as a means with which to change the incidents of Federal governmental Power delegated by the "sovereign people" to their common agency, their Federal Government, to improve the form and structure of said Federal Government, or as lately decided in *Rhode Island* v. *Palmer* to "delegate new powers" to that governmental agency.

It was not established to amend, abolish, destroy or limit in any way, the sovereignty of the people, i. e., to determine who shall constitute "the people."

The ultimate sovereignty of the people, as expressed in the free determination of suffrage qualifications, the right of the people to determine for themselves who shall exercise their sovereignty, who shall govern them, is not even delegated to their State Governments, but reserved under the control of the people themselves in their State Constitutions.

Changing the "Sovereign Power" is not an end or purpose of the Federal Government. The amending clause was not provided for "Amending the people." The people were not setting up an amending agency for their own destruction.

The powers of their Federal governmental agency were not limited, and those limits committed to writing, to the end that the sovereign people, who themselves imposed the limits, should have their sovereignty destroyed, infringed or impaired by mere

agents selected to shift these "powers of government," perfect the Federal Government, or grant to it new governmental powers.

The creature is not greater than the creator.

For only one office created by the Federal Constitution was popular election provided—members of the House of Representatives.

For this office "the electors in each State shall have the qualifications for electors of the most numerous branch of the State legislatures." [1]

That is more than a mere uniform rule for the exercise of State authority. That is more than the recognition of the residuary sovereignty of the people of the States, from whom a "grant of powers" for a Federal governmental agency was being asked, as applicable to the election of each State's representatives in the Federal House. It was the adoption of the same *basis* of sovereignty for the Federal Union as existed in the States.

It was a recognition that the "sovereign people" who were asked to ratify in their States were the "same sovereign people" who were to constitute the ultimate sovereignty under the Constitution.

The same "sovereign people" who governed their individual States, to whom the Constitution was submitted and by whom it was ratified, who through their own State government were to appoint electors for their Federal Executive, and through their own State legislatures (now by their own direct votes) were to choose their ambassadors in the Federal Senate; were by Section 2 of Article 1 established and constituted as the popular sovereignty for the only office to be directly elected in their Federal government, then being created by themselves, "in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, *and secure the blessings of liberty to themselves and their posterity.*"

Grant that the amending power as "delegated" for proposal by Congress and "reserved" for ratification through State Legislatures covers

[1] Art. 1, Sec. 2.

(1) Any transfer of governmental power from the State governments to the Federal Congress,

(2) Any change in the structure or machinery of the Federal *Government,*

(3) Any enlargement of Federal Power or limitation thereon,

(4) Any new limitation on the powers of the State *Governments.* Grant that by extra constitutional means in both proposal and ratification the amending power was the *form used* for expressing the results of revolution after the Civil War. Then by submission to *vis major* followed by the unanimous "consent" of all the States and the acquiescence of all the people of the United States, the entire Nation was "reconstructed," made anew, to permanently establish the freedom and equality of the negro race, for which the Civil War was fought, by constituting said race part of the sovereign people of the United States.

The fact was "revolution." The form of settlement happened to be through the Amending Clause, a use thereof only sanctioned by the "Laws of War." This extra Constitutional procedure was, however, acquiesced in by all.

Any other method for permanently registering the inexorable decree of civil war would have been equally effective. It simply *under that form* registered in the organic law the fact already accomplished.[2]

Here no "revolution" is to be settled, no subject race freed, no peace terms to be imposed on rebel states, but the form used in that revolutionary act is now invoked to *destroy the sovereignty of the people.*

Article V itself (aside from revolutionary sanction) was never intended to deal, could not in the nature of the case deal with or affect the sovereignty of the people.

Here it is attempted through its use to *attack, limit and fossilize* the people's sovereignty in their State and local elections

[2] In general throughout most if not all the States which rebelled either through the "reconstruction" of State Constitution or by military fiat, the Freedman had been permitted to vote before the 15th Amendment was adopted. The Freedman of those States thus previously enfranchised elected the legislatures whose affirmative votes made up the necessary three-fourths for the 15th Amendment.

as well as in the election of Federal representatives and in the choice of legislatures and conventions to assent to or dissent from proposed Federal Amendments.

When they ratified the Constitution, the people were not asked to cede their sovereign power, nor to delegate, to any agents whatsoever, the right to interfere with their sovereignty. And Section 2 of Article 1, recognized its continuance in them as before.

The ultimate sovereignty of the people exists in their States, outside their Federal Constitution, outside and beyond their Federal Government. An Amending clause for perfecting and changing the Federal Constitution, bears no relation to the sovereignty of the people, cannot deal with it, cannot amend or destroy it.

Their sovereignty and its ultimate expression through "suffrage", remains the same forever, until changed by the people themselves, by their own political action in amending their State Constitutions, where they have deposited it, unless forcibly changed by revolution.

Assembled in State conventions for the purpose of discarding their present form of government and adopting a new one, as they adopted the present Constitution, they could of course change it or surrender it.

They could thus surrender their ultimate sovereignty to a king, to an aristocracy, to a dictatorship (of the proletariat or otherwise). But this again amounts to revolution.

No mere legislatures, acting representatively, in amending a mere "grant of powers" for Federal purposes (which is all the Constitution is), can take upon themselves the sovereignty of the people and determine for them, by practically irrepealable rule, who shall govern them, who shall exercise their sovereignty.

The Federal Constitution did not destroy the sovereignty of the people. It protected it, both in the perpetual proviso in Article V itself and in the whole scheme of the instrument.

The Federal Constitution is not a grant of "sovereignty," but a mere grant of Federal powers to a "common agency," created to protect and preserve the rights of the people and to safeguard in perpetuity their sovereign power.

As Madison said in the Federalist, Article 46:

"The Federal and State Governments are in fact but different agents and trustees of the people instituted with different powers and designated for different purposes.[3]

"The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies but as uncontrolled by any common *superior* * * * the ultimate authority, wherever the derivative may be found, resides in the *people* alone * * * Truth no less than decency requires that the events in every case, should be supposed to depend on the sentiments and sanction of their *common* constituents."

The power of the Amending Agents is necessarily limited to the Federal grant which did not include the right to grant or withhold suffrage, the determination of who shall exercise the sovereignty of the people.

This same sovereignty of the people who ratified the Constitution, "the original fountain of power" acting in their States, has been recognized by the Supreme Court from *McCulloch* v. *Maryland*[4] to *Dillon* v. *Gloss*[5] as the source of the grant itself and of all new governmental powers added thereto by amendment.

Having made no change of sovereignty away from the "people" who ratified, having constituted no new sovereignty in the Constitution itself, it conclusively follows, that no provision for amending or changing this mere grant of governmental powers can subtract one hair from the sovereignty of those who made the grant, the sovereign people of the United States.

Alexander Hamilton (in 52nd Federalist) spoke of the definition of suffrage as being "a fundamental article of republican government" properly beyond legislative control, which it was incumbent on the convention to establish in the Constitution. And that *as so established* in Article I it was rightly *not* subject to regulation by either *Congress* or the *State Legislatures,* adding:

"It must be satisfactory to every State because it is conform-

[3] Cited by Chief Justice Fuller in Pollock *v.* Farmers Loan & Trust Co., 158 U. S. at page 560.

[4] 4 Wheaton 403.

[5] Decided May 16, 1921.

able to the standard established or *which may be established* by the State itself."

This of course was untrue if Congress and outside legislatures could dictate a State's suffrage.

He continues:

"It will be safe to the United States because being fixed by the *State Constitutions,* it is not alterable by the *State governments.*"

Later, in 59th Federalist, while defending Congressional control of the "times, places and manner" of elections for the Federal House, he said:

"Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections *for the particular states*" * * * This would be * * * "an unwarranted transportation of power and a premeditated engine for the *destruction* of the *state governments*" * * * adding that "each" (the Federal and State Governments) as far as possible ought to *depend on itself for its own preservation.*"

Then urging that because the States could refuse to elect Senators, was no reason for giving them similar power over the House, he said:

"So far as the mode of formation (he was speaking of the Senate) may expose the Union to the possibility of injury from the State legislatures it is an evil; but it is an evil, which could not have been avoided without *excluding the States, in their political capacities,* wholly, from a place in the organization of the National government. If this had been done it would certainly have deprived the State governments of that *absolute safeguard* which they will enjoy under this provision."

He was speaking of the "constitution of the national senate" as permitting the States to refuse to elect Senators. The "absolute safeguard" referred to is the "equal suffrage of the States" in the Senate made safe from amendment by Article V.

Thus Hamilton demonstrates:

(1) That under the Federal Plan of the Constitution "determination of suffrage qualifications" was within the sphere of

neither Federal nor State *Governments,* but rests with the *people* alone through their State Constitutions.

(2) That outside interference with the internal elections of a State (even without dictating the suffrage qualifications of her people) destroyed the State and was not contemplated by the plan.

(3) That to deprive a State of the unhampered right to select, or even refuse to select, her own Senators, would violate the compromise establishing the "equality of the States in the Senate" made perpetual by the plan.

Thus did the most extreme exponent of Nationalism honestly and persuasively expound the constitution while urging the people of New York to ratify.

He was a faithful witness to the effect of the great compromise for "equal suffrage in the Senate" to which in the convention he had unwillingly assented.

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## *Addenda.*

If new legislative *powers* may be conferred on Congress, they must be *governmental powers, not sovereignty.* Suffrage at least cannot be fossilized. The people's sovereignty is forever reserved to them in their several States.

Even if State *Legislative Power* can be transferred to the Congress thus leaving somewhere to the people's representatives legislative power for modification or repeal; nevertheless such action cannot be taken in a matter not affecting a *Governmental Power* by setting up a rigid, practically irrepealable, self-executing, rule of sovereignty. For suffrage is sovereignty.

The Nineteenth Amendment attempts to destroy, in part, the peoples' right to repeal, amend or modify "local suffrage qualifications" except with the permission of stranger legislatures of other States whom they cannot influence or control.

In other words, if the inherent nature of an "indestructible Union of indestructible States" does not prevent the addition of new National Legislative Powers it does prevent the fossilization of "local suffrage" leaving no democratic remedy in the people, in Congress, or in State Legislatures to change or mod-

ify it. It does prevent the destruction of all power over suffrage either by the people themselves or through legislative bodies *in which they are represented.*

If State control is destroyed Congressional control at least must be substituted. Some *democratic* remedy for repeal or modification must remain.

Irrepealable legislation controlling the people's sovereignty has no place in the democratic Government of the United States. If "local" self-government can be destroyed some sort of "self-government" must at least remain.

Appealing to stranger legislators (perhaps 3,000 miles away) whose opinions we can neither influence nor affect, *because they are not responsible to us,* to relieve us from *obnoxious* suffrage rules affecting our right to vote is *most emphatically not a political remedy.* It, by no stretch of the imagination, can be called *self-government.* It is the slave's begging petition to irresponsible power. Likewise the imposition upon us by stranger legislatures of such unchanging suffrage rules is not an *orderly, responsible democratic process of government.* And no sophistry can make it so.

The whole underlying scheme and purpose of our Federal Constitution protects us from this kind of tyranny.

The moment the Amending Agents can control the suffrage of a State, by changing against their will the suffrage qualifications of its people, all the political rights of the people who comprise that State (including their "suffrage in the Senate" and their right to assent to or dissent from future constitutional amendments) exists only at the mercy of strangers.

After that it cannot truthfully be called an "indestructible state." Its suffrage in the Senate is no longer controlled by itself and outsiders determine who within its boundaries shall select the conventions and legislatures to assent to such Federal Amendments as these Amending Agents or their successors shall submit to the *new* electorate in the *new* State which they have themselves constructed.

The people therein not only lose their local self-government, and the right as members of the Federal Union to choose their own Senators guaranteed to them in perpetuity, but the people

of the States, that is the States, cease to take part in amending the Federal Constitution.

Thus the alleged almighty amending power becomes a "frankenstein". The Agents appointed under it usurp the "sovereignty" of the "people" who created it.

The people of 33 States who had failed or refused to enfranchise their own women by the orderly process of amending their State Constitutions, upon whom now the Amending Agents have thus conferred the right to vote seem complaisant.

Perhaps in the absence of discussion they do not appreciate the consequences. Perhaps as some claim they care no longer for the right of self-government. But more likely they realize that any political protest on their part would be vain and that the Courts alone can protect them. For they enjoyed no democratic political remedy with which to stop it, none by which they can repeal or modify it.

Therein lies the danger. Any destructive policy may be thus imposed upon the people against their will, in irrepealable form, by the weakness or cowardice of their Amending Agents yielding to the pressure of well organized minorities.

Each such new tyranny speaking *ex cathedra* as and through the Constitution will oppress a helpless people possessing no democratic remedy either for prevention or repeal.

These are the pregnant consequences which hang upon the approaching decision of our highest Court established to protect our dual system of government the basis of all our political liberty for which our fathers fought.

G. S. B.

The debate on Article V (5 Ell. Deb. 532) shows that the possibility of destroying the ultimate sovereignty of the people who comprise a State, i. e., their power to "consent" which means their power to "vote" was considered by the convention as a conceivable misconstruction of the Amending Power and therefore expressly withdrawn.

To this end it was provided that "no State, without its consent shall be deprived of its equal suffrage in the Senate" by any constitutional amendment.

The people of a State, who are the State, can only consent through their own qualified voters. If outsiders dictate the qualifications it is no longer "consent" but "compulsion". Likewise Senators who are to record their "suffrage in the Senate" must necessarily be elected by voters whom they (and not outsiders) have qualified.